ment between MIMB and Bahagia to assign. To my mind, the distinction between contract and agreement is not relevant for the purpose of determining the existence of an equitable assignment in this case. Once there is a clear intention on the part of Bahagia that MIMB should get the benefits of the MAS contract by conveying such intention to MIMB, an equitable assignment is created, and when the stake-holder/MAS became aware of it on July 2, 1975, it became a trustee for MIMB in respect of the moneys due under the MAS contract with Bahagia, and MAS as a debtor or stake-holder is liable to pay the sum of $62,358 to MIMB, although it has already paid this sum to Bahagia, albeit in breach of trust.

Counsel for MAS also argues that, although the total amount payable under purchase orders AB8 to AB11 is $64,542.30, the plaintiff only claims for $64,542 in the Statement of Claim. There being a difference of 30¢, he contends that the assignment is not absolute. It is true to constitute an enforceable assignment in equity, the assignment must be absolute and not partial. But, by paragraphs 1 and 2 of Statement of Agreed Facts, it is not in dispute that Bahagia had agreed to assign and transfer absolutely to MIMB the whole of the moneys payable to it from MAS under the contract. Since both parties have agreed that the assignment is absolute, it is not open for defendant now to say otherwise. In any event, what has become due and payable under the contract is the sum of $62,358 and on the principle of *de minimis non curat lex*, this court should ignore the 30¢ difference.

Although not covered by the agreed issues, counsel for MAS also contends that the failure to join Bahagia as a party in these proceedings is fatal to its claim. The purpose of such joinder, according to Mr. Chin, is for accounts to be taken. In my view, where the assignment is absolute, then the assignee can sue in its own name, without joining the Assignor. (See *Snell's* Principle of Equity, 27th Edition, page 78). On the facts of the present case, Bahagia/Assignor has no more interest in the debt, and since Bahagia, which apparently is now defunct, can only be joined as a defendant and not as third party, I see no purpose for such joinder by plaintiff. But, it is of course open to defendant to join the Assignor as a defendant, as was done in *Sanders & Co.* v. *Peek.*[7] But the Assignor cannot be compelled to come as a plaintiff. I am of the view that in the circumstances of the present case, the failure of Assignee to join the Assignor as a party is not fatal to plaintiff's claim.

On balance of probabilities on the evidence, I find it is the clear intention of Bahagia that MIMB should get the benefit of MAS contract. The defendant has not adduced any evidence to challenge such intention which is supported by PW1's testimony and corroborated by documentary exhibits. In the event, I give judgment for the plaintiff in the sum of $62,358 and interest thereon at 6% per annum till date of payment, and costs.

Claim allowed.

Solicitors: *Shook Lin & Bok; Allen & Gledhill.*

QBE INSURANCE LIMITED v. DR. K. THURAISINGAM

[A.C.J. (Wong Kim Fatt J.C.) January 20, 1982]
[Seremban — Civil Appeal No. 13 of 1981]

Insurance — Judgment against insured by 3rd party — Claim by third party direct against insurers — Whether insurers liable for property damage — Compulsory insurance — Road Traffic Ordinance, 1958, ss. 75(1)(b) & 80(1).

In this appeal, the third party brought an action direct against the insurers to recover a judgment sum for property damage caused by the insured of the insurers in a road accident under section 80(1) of the Road Traffic Ordinance, 1958. The learned trial Magistrate held that there was contractual liability on the part of the insurers and found for the third party. The insurers appealed.

Held, allowing the appeal: (1) as the judgment obtained by the third party was in respect of property damage only, and not death or bodily injury within the scope of compulsory insurance, he had no statutory right of action against the insurers under sections 80(1) and 75(1)(b) of the Ordinance;

(2) the learned Magistrate erred in law in holding there was contractual liability on the part of the insurers.

Cases referred to:-

(1) *British Cash and Parcel Conveyors Ltd.* v. *Lamson Store Service Co. Ltd.* [1908] 1 K.B. 1006, 1014.

(2) *New Zealand Insurance Co. Ltd.* v. *Sinnadorai* [1969] 1 M.L.J. 183.

CIVIL APPEAL.

S. Radhakrishnan for appellants.

Rajan Rajasooria for respondent.

Cur. Adv. Vult.

Wong Kim Fatt J.C.: In this appeal the appellants, QBE Insurance Limited ("the insurers"), were at all material times the insurers of one Cheok Beng Seng ("the insured"), the defendant in Port Dickson Magistrate's Court Civil Action No. 55 of 1978 (formerly Port Dickson Sessions Court Civil Action No. 24 of 1977) in respect of a motor vehicle No. NH 4122, which, while being driven by the insured at 2½ milestone along Port Dickson-Seremban Road in the direction of Port Dickson, knocked into the rear part of motor car No. BK 9062 driven by the respondent, one Dr. K. Thuraisingam ("the third party") on or about February 23, 1977. The third party as plaintiff in the said Civil Action No. 55 of 1978 obtained on May 22, 1979 judgment by default against the insured in the sum of some $6,300 for property damage with interest and costs (hereinafter referred to as "the judgment sum"). It is not in dispute that the third party had abandoned, not surprisingly, his claim for his superficial bodily injury in the form of a tender and swollen left knee for which he was asked to take his own treatment. Upon the insurers refusing to pay the judgment sum, the third party brought against them the above Civil Action No. 87 of 1979, which is the subject-matter of this appeal, relying in effect on the policy of insurance issued by the insurers and on sections 75(3) and 80(1) of the Road Traffic Ordinance, 1958 ("the Ordinance"). The insurers contended that they were not liable to pay the judgment sum. In the result, the learned Magistrate held that there was contractual liability on the part of the insurers and gave judgment on March 25, 1981, in favour of the third party, and hence this appeal by the insurers.

When the appeal came up for argument on January 7, 1982, learned counsel for the insurers and the third party agreed, and quite rightly so, that there was no question of vicarious liability in this appeal on the part of the insurers.

There are only two grounds of appeal. I may for convenience first deal with the second ground, that is there is no contractual liability between the third party and the insurers because the third party is not privy to the contract of insurance, the parties to which are the insurers and the insured. This issue is plain and simple and was conceded by learned counsel for the third party in the course of argument.

The only issue that remains for my decision is whether the insurers are liable to satisfy the judgment sum, notwithstanding the fact that it is solely in respect of property damage, i.e. special damages consisting mainly of the cost of repair to the car and of hiring a taxi while the car was under repair, and hence, as contended by learned counsel for the insurers, is not a judgment in respect of a liability within the meaning and scope of compulsory insurance as provided by section 80(1) of the Ordinance reading as follows:

"80. (1) If, after a certificate of insurance has been delivered under subsection (4) of section 75 of this Ordinance to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of subsection (1) of section 75 of this Ordinance (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments."

Learned counsel for the third party submits that sections 74(1) and 75(3) of the Ordinance should be read together with the contract of insurance with special reference to section II 1(b) of the insurance policy, and that, on proper construction, the insurers are liable to satisfy the judgment sum.

Section 74(1) of the Ordinance reads as follows:

"74. (1) Subject to the provisions of this Part of this Ordinance it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle unless there is in force in relation to the user of the motor vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part of this Ordinance."

Section II(1) of the policy is in the following terms:

"SECTION II — LIABILITY TO THIRD PARTIES

1. The Company will subject to the Limits of Liability *indemnify the insured* [italics mine] in the event of accident caused by or arising out of the use of the Motor Vehicle or in connection with the loading or unloading of the Motor Vehicle against all sums including claimant's costs and expenses which the insured shall become legally liable to pay in respect of —

(a) death of or bodily injury to any person
(b) damage to property."

Sections 74, 75, and 80 come under Part IV under the heading "PROVISIONS AGAINST THIRD PARTY RISKS ARISING OUT OF THE USE OF MOTOR VEHICLES" of the Ordinance. The provisions of section 75(1) and (3) thereof referred to in the argument of counsel read as follows:

"75. (1) In order to comply with the requirements of this Part of this Ordinance a policy of insurance must be a policy which —

(a) is issued by a person who is an authorised insurer within the meaning of this Part of this Ordinance; and

(b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the *death of or bodily injury to* [italics mine] any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road:

Provided that such policy shall not be required to cover —

(i) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or

(ii) except in the case of a motor vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the motor vehicle at the time of the occurrence of the event out of which the claims arise; or

(iii) any contractual liability.

....

(3) Notwithstanding anything in any written law a person issuing a policy of insurance under this section shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons."

I may with respect point out in the first place that a contract of motor insurance between the insurers and the insured is a contract of indemnity. This means that the insurers will indemnify the insured, not the third party who is not privy to the contract, in the event of accident caused by or arising out of the use of the insured motor vehicle in respect of death or bodily injury to any person or damage to property and the liability must be one covered by the terms of the policy. A contract of motor insurance may be said to be one of the common contracts of indemnity known to the law. Other common examples of contracts of indemnity are to be found in fire insurance and marine insurance (see *British Cash and Parcel Conveyors Ltd.* v. *Lamson Store Service Co. Ltd.*[1]).

The outcome of this appeal depends on the interpretation of section 75(1)(b) and section 80(1) of the Ordinance. Section 75(1)(b) makes it a statutory compulsion or requirement that a policy of insurance must be one which covers any liability which the insured may have incurred in respect of the *death of* or *bodily injury to* any third party, caused by or arising out of the use of the motor vehicle on a road, and further, under proviso (ii) thereof, any passenger carried by the insured for hire or reward in public service vehicles, or by reason of or in pursuance of a contract of employment. Proviso (i) makes it non-compulsory to cover liability for death or bodily injury suffered by any person in the course of his employment with a person insured by the policy, arising out of and

in the course of his employment. The object of the legislation is to protect third parties and fare-paying passengers. Whether this protection is adequate under our present law is a matter for Parliament. By proviso (ii) to section 75(1)(b), liability in respect of passengers travelling in, getting into or out of private motor vehicles is not required by the Ordinance to be covered so that an insured has to pay an additional premium to his insurance company to cover passenger risks or other additional but non-compulsory risks such as war, or strike, riot, and civil commotion.

Section 80(1) of the Ordinance confers the statutory right to a third party armed with a judgment in respect of the liability that must be covered compulsorily, that is liability in respect of death or bodily injury (which must be a liability covered by the terms of the policy), but not property damage suffered by a third party, to sue the insurers direct for recovery of the judgment sum, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, subject, however, to the provisions of this section. These provisions, such as the service of notice on the insurer regarding the commencement of legal proceedings, must be complied with by the third party before the insurer is obliged under the Ordinance to satisfy the judgment.

In the Federal Court case of *New Zealand Insurance Co. Ltd.* v. *Sinnadorai,*[2] the late H.T. Ong C.J. (Malaya), with whom Suffian F.J. (as he then was) and Abdul Aziz J. concurred, said on page 185 with reference to sections 80(1) and 75(1)(b) of the Ordinance:

"In plain language this means that insurance cover is compulsory in respect of (a) *all third parties other than passengers* carried in the insured's vehicle and (b) *passengers* carried by the insured, either for hire or reward, that is to say, in public service vehicles, or by reason or in pursuance of a contract of employment. Passengers in private vehicles consequently do not come within the ambit of compulsory insurance. Up to this point there is no difference of opinion between counsel on both sides. The real conflict is on the interpretation of the bracketed words in section 80(1), 'being a liability covered by the terms of the policy'. Is such liability to be construed as synonymous and exegetical of 'such liability as is required to be covered by a policy under paragraph (b) of sub-section (1) of section 75'?"

The learned Chief Justice held that the word "being" did not mean "or" so as to extend the scope of the insurers' liability to a third party who, being a passenger in a private vehicle in that case, was disentitled from relying on section 80(1) which confers statutory benefits to third parties in cases where third party cover is made compulsory.

Section 75(1) of the Ordinance is substantially the same as section 145 of the English Road Traffic Act, 1972, which has been drafted in a language that is clearer and simpler to understand. Section 145 of the English Act does not under subsection (3)(a) make cover for property damage compulsory but has made provisions for payment for emergency treatment under subsection (3)(b). Section 145 is worth noting and reads as follows:

"145. Requirements in respect of policies of insurance

(1) In order to comply with the requirements of this Part of this Act, a policy of insurance must satisfy the following conditions.

(2) The policy must be issued by an authorised insurer, that is to say, a person or body of persons carrying on motor vehicle insurance business in Great Britain.

(3) Subject to subsection (4) below, the policy —

(a) must insure such person, persons or classes of persons as may be specified in the policy in respect of any liability of which may be incurred by him or them in respect of the death of or bodily injury to any person caused by, or arising out of, the use of the vehicle on a road; and

(b) must also insure him or them in respect of any liability which may be incurred by him or them under the provisions of this Part of this Act relating to payment for emergency treatment.

(4) The policy shall not, by virtue of subsection (3)(a) above, be required to cover —

(a) liability in respect of the death, arising out of and in the course of his employment, of a person in the employment, of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or

(b) any contractual liability."

As section 80(1) is *in pari materia* with section 10(1) of the English Road Traffic Act of 1934, my views are fortified by a statement of law, applicable to the present appeal, appearing in paragraph 769, page 375, of Volume 22 of *Halsbury's* Law of England (Third Edition) reading as follows:

"769. Judgments required to be satisfied.

The first condition of the obligation of the insurers is that there is a judgment. The second condition is that the judgment must be in respect of a liability which is required to be covered by compulsory insurance. In other words the only person who can maintain a right of action direct against the insurers is a person falling within the limited class of third parties whose bodily injury or death is required to be covered by a motor policy. The third condition is that the liability is in fact covered by the terms of the policy or would be covered by the policy but for the fact that the insurer is entitled to avoid or cancel, or has avoided or cancelled the policy."

Thus in the present appeal the third party has not obtained a judgment against the insured for bodily injury. Since the third party is alive, it is obvious that no judgment can be obtained against the insured for death. As stated before, the judgment obtained by the insured is in respect of property damage only. In the circumstances, it is clear that the third party, by virtue of the provisions of sections 75(1)(b) and 80(1) of the Ordinance, has no statutory rights to sue the insurers direct for recovery of the judgment sum. The third party at common law may only sue the insured for tort or breach of duty of care, if any, and, although the insurers have undertaken to indemnify the insured, the third party in the present appeal has no right of action against them.

The contention by learned counsel for the third party that there is liability on the insurers to pay the judgment sum must fail. The learned Magistrate erred in law in holding that the insurers are contractually liable to pay the judgment sum where it is clear from the record that there is no privity of contract between the insurers and the third party. The learned Magistrate erroneously equated the insurers' undertaking to indemnify the insured with a contract or undertaking to indemnify or pay the third party for property damage sustained by him.

I therefore allow the appeal and set aside the judgment and order of the learned Magistrate, with costs here and the court below.

Appeal allowed.

Solicitors: *Shearn, Delamore & Co.; Rajasooria & Son.*

LEONG WAN YIN & ANOR. v. NESTRA PLANTATIONS SDN. BHD.

[O.C.J. (Wong Kim Fatt J.C.) January 28, 1982]
[Seremban — Civil Suit No. 250 of 1981]

Company Law — Shares — Sale of — Plantiffs obtained ex parte injunction — Non-disclosure of material facts — 51% ownership — Status quo — Alternatives for Court — Defendants applied for discharge — Whether injunction should be discharged.

The plaintiffs and another shareholder had contracted by written agreement dated 8th April 1981 to sell to the defendants 97% of their shares in Lemo Sdn. Bhd. ("Lemo") and disputes had arisen between the plaintiffs and the defendants. After filing the writ and statement of claim against the defendants, the plaintiffs applied for and obtained an *ex parte* interim injunction against the defendants restraining them from *inter alia* managing the affairs of Lemo.

The plaintiffs did not disclose that the defendants were the registered owners of 51% of the shares in Lemo and that prior to the application the second plaintiff had varied the agreement of sale of 8th April 1981. The defendants applied for discharge of the injunction.

Held, allowing the application: (1) as the plaintiffs had not disclosed that the defendants owned 51% of the shares in Lemo and that the second plaintiff had varied on 16th November 1981 the agreement of 8th April 1981 regarding his 18% of the shares and waiving the requirement for approval of the Foreign Investment Committee, the injunction should be discharged on this ground of non-disclosure alone;

(2) since the defendants had acquired the controlling interest in Lemo, it is not proper for the court by injunction to restrain the defendants, their directors or servants from the management of the affairs of Lemo. The cheque books, books of accounts, company seal, share register, etc. of Lemo should not be handed over to the first plaintiff, who, as shareholder and vendor, had no property in the property of Lemo;

(3) the *status quo* is best preserved by reverting the parties to their respective positions immediately before the granting of the interim injunction. The Court considers it more beneficial, or, in negative expressions, less harmful to Lemo for the defendants to retain possession and management of the oil palm estate, the principal asset of Lemo, until final disposal of the suit or further order of the court.

Cases referred to:-

(1) *Sari Artists Film Productions Sdn. Bhd.* v. *Malaysia Film Industries Sdn. Bhd.* [1974] 1 M.L.J. 123.

(2) *Negocios Del Mar S.A.* v. *Doric Shipping Corporation S.A. ("The Assios")* [1979] 1 Lloyd's Rep. 331.

(3) *Third Chandris Shipping Corporation* v. *Unimarine S.A.* [1979] 2 All E.R. 972 at 984.

(4) *Macaura* v. *Northern Assurance Co. Ltd.* [1925] All E.R. 51, 54.

SUMMONS-IN-CHAMBERS.

R.R. Sethu (*Miss Ng Yoke Mui* with him) for defendants/applicants.

Ting Poi Tek (*Chin Choon Fan* with him) for plaintiffs/respondents.

Cur. Adv. Vult.

Wong Kim Fatt J.C.: The plaintiffs filed their appeal to the Federal Court on January 19, 1982 against my decision in chambers made on December 29, 1981 discharging the interim injunction granted by me on December 11, 1981. I gave my certificate under Order 56 rule 2(2), of the Rules of the High Court, 1980, on January 6, 1982 that I required no further argument. The events leading to this appeal may be described as follows. By an agreement in writing dated April 8, 1981, the plaintiffs and one Mohammad Abu Bakar contracted to sell 97% of their shares in a Malaysian private limited company by the name of Lemo Sdn. Bhd. ("Lemo"). The principal asset of Lemo comprised some 1,000 acres of oil palm estate in Trengganu. Founding their action on the above agreement, the plaintiffs sued the defendants for numerous orders as follows:

(a) A declaration that the agreement dated the 8th day of April 1981 became impossible of performance on the failure to obtain the approval from the Foreign Investment Committee within the stipulated time — by the 8th day of October, 1981.

(b) A declaration that all acts done including the appointment of the nominee directors Muhammad bin Awang and Rosdy bin Abdul Rahman and the company secretary Norma Mohd. Sani in anticipation of the completion of the agreement ceased to have any further effect on the 8th day of October 1981 on the failure to obtain the approval.

(c) A declaration that the first plaintiff Leong Wan Yin alias Leong Mun Ying and Mohd. Abu Bakar are the directors of Lemo with effect from the 8th day of October 1981 and are entitled to carry out all the acts and functions assigned to them by the Articles of Association.

(d) An injunction restraining Muhammad bin Awang, Rosdy bin Abdul Rahman and Norma Mohd. Sani to act as directors, company secretary and/or officers of Lemo forthwith.

(e) That the stakeholders and/or the defendants return all the share certificates and the blank transfer forms to the plaintiffs and/or Mohd. Abu Bakar.

(f) That the defendants retransfer all the shares registered into their names within 7 days of the service of the order and on their failure to do so, the Senior Assistant Registrar may effect such transfers or assurances to effect the ownership or alternatively that the Senior Assistant Registrar do direct the rectification of Lemo's register to effect this order.

(g) An account of all receipts and expenses of Lemo.

(h) Return of all books of accounts, vouchers, books, all documents and register of shareholders belonging to Lemo.

(i) Damages if any after taking of accounts for any waste and other acts.

(j) Costs and interests.

Soon after filing the writ and statement of claim, the plaintiffs made an *ex parte* application by summons-in-chambers dated December 10, 1981 for the following order: